88-1038

No. _____

Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DIKRAN BERBERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS FOR REVIEW

I. WHETHER THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (**JACKSON V. VIRGINIA**, 443 U.S. 307 (1979)).

II. WHETHER THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL.

III. WHETHER THE FILING OF A WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT.

TABLE OF CONTENTS

	Page
INTRODUCTION.	1
OPINION BELOW	1
STATEMENT OF JURISDICTION	2
STATUTE INVOLVED.	2
STATEMENT OF THE CASE	3
SUPPLEMENTAL STATEMENT OF FACTS	3
REASONS FOR ALLOWANCES OF THE WRIT. . . .	9
I. THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (JACKSON V. VIRGINIA, 443 U.S. 307 (1979)) AND CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS.	9
II. THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL	17
III. THE WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT	19
CONCLUSION.	22

TABLE OF AUTHORITIES

Cases	Page
Bose Corp v. Consumer's Union of U.S., Inc., 466 U.S. 485 (1984)	12
Glasser v. United States, 315 U.S. 60 (1942)	11
Hamling v. United States, 418 U.S. 87 (1974)	11
In re Winship, 397 U.S. 358 (1970)	10, 11
Jackson v. Virginia, 443 U.S. 307 (1979)	10, 11, 19
United States v. Berberian, 851 F.2d. 236 (9th Cir. 1988)	10
United States v. Deparias, 805 F.2d 1447 (11th Cir. 1986)	14
United States v. DeSimone, 660 F.2d 532 (5th Cir. 1981)	14
United States v. Dunn, 564 F.2d 348 (9th Cir. 1977)	15
United States v. Escobar, 674 F.2d 469 (5th Cir. 1982)	14
United States v. Freeman, 660 F.2d 1030 (5th Cir. 1981)	14
United States v. Glasgow, 658 F.2d 1036 (5th Cir. 1981)	13
United States v. Kimble, 719 F.2d 1253 (5th Cir. 1983)	14

United States v. Malatesta, 590 F.2d 1379 (5th Cir. 1979) 13-15

United States v. Marsh, 747 F.2d 7 (1st Cir. 1984) 14

United States v. Shackelford, 667 F.2d 422 (5th Cir. 1982) 14

United States v. Slocum, 708 F.2d 587 (11th Cir. 1983) 14

United States v. Spradlen, 662 F.2d 724 (11th Cir. 1981) 14

Statutes Page

18 U.S.C. 844(d) 2-3

18 U.S.C. 3162(a)(2) 20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Dikran Berberian, requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit in **United States v. Dikran Berberian**, No. 86-5073.

OPINION BELOW

The Opinion of the Court of Appeals affirmed the conviction and sentence of petitioner and is officially reported at 851 F.2d 236 (9th Cir. 1988). A copy of the

Opinion is attached as Appendix A.

STATEMENT OF JURISDICTION

On 28 June 1988 the Court of Appeals entered judgment affirming the conviction of the petitioner for conspiracy and aiding and abetting the interstate transportation of explosive materials and aiding and abetting such transportation (18 U.S.C. 371, 2, and 844(d)). On 2 November 1988 this Petition for Rehearing and Suggestion for Rehearing En Banc was denied (Appendix B). This Court's jurisdiction to review the judgment of the Court of Appeals is conferred by 28 U.S.C. 1254(1).

STATUTE INVOLVED

The petitioner was convicted of the conspiracy and substantive offense that were in violation of 18 U.S.C. 844(d):

> Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual

> or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or fined not more than $10,000, or both. . . .

STATEMENT OF THE CASE

After a federal jury trial, the petitioner was convicted of the conspiracy and aiding and abetting the interstate transportation of explosives (18 U.S.C. 371, 2, 844(d)), but acquitted of the possession of the improvised explosive device (26 U.S.C. 5861(d)). The defendant received consecutive sentences and is serving them at the Federal Correctional Institution, Terminal Island, California. The federal district court had jurisdiction of these federal criminal offenses. 18 U.S.C. 3231.

SUPPLEMENTAL STATEMENT OF FACTS[1]

[1] The Court of Appeals Opinion provides a brief summary of the facts (Appendix A, 3-4), but an amplification of the facts is necessary in order for this Court to evaluate the application of the "slight evidence rule."

From 20 September through 22 October 1982, Co-defendants Hovsepian, Yacoubian, Sarkissian, and Dadaian planned to blow up the office of the Honorary Turkish Counsel which was located on the fifth floor of the Smylie Building in Philadelphia, Pennsylvania (1 RT 105, 115-116). Their plans, discussed in Armenian with some code names (i.e., "Hratch's son" (2 RT 132)), were discovered by a FISA wiretap on Hovsepian's phone, and the transcripts of 27 conversations[2] during this time period were introduced in evidence (1 RT 83-86; GX 2A-2AA).

On 22 October 1982 Dadaian flew to Boston where he was arrested. In his suitcase there was an improvised explosive device consisting of a timing device attached to a wooden block, a blasting cap, and five sticks of dynamite

[2] Hovsepian, Yacoubian, and Sarkissian were participants in eleven of these calls which were related to the flight of Dadaian with the explosive device to Boston and occurred from 11:42 p.m. 21 October 1982 to 5:54 p.m. 22 October 1982 (2 RT 254-282; GX 2P-2AA). None of these calls involved Berberian or contained references to him.

(the explosives and the timing device were in the same suitcase but all separated)(2 RT 241, 295-297). Also found in Dadaian's suitcase was a circuit tester (2 RT 296, 345).

On 30 September 1982, petitioner in a telephone conversation with Hovsepian, arranged to meet with him at a cafe in Westwood (Los Angeles) (2 RT 123-127). On 6 October 1982, petitioner and Hovsepian had a telephone conversation in which Hovsepian asked petitioner to meet him in front of his house at 8:30 (2 RT 134-135). In the afternoon of 17 October 1982, petitioner and Hovsepian spoke on the phone about Hovsepian's return, and Hovsepian suggested a meeting the following day at "number one" and says that he has "good news" (2 RT 139-140). Later that evening, Hovsepian left a brief message on petitioner's answering machine that they were to meet at "number two" (2 RT 141).

On 21 October 1982 FBI surveillance

observed petitioner make the following purchases: three or four white plastic wire ties, two Duracell 9-volt transistor batteries, and H-block made of wood, four grey wire nuts, a roll of solder, a circuit tester (2 RT 150-151), a toggle switch (2 RT 152), a single edged razor blade, a bag of six or eight grey colored screws (2 RT 172), a Timex watch (2 RT 178-188), and a bag of 3/4" silver screws (2 RT 218).

The H-block of wood was from the same cut as a sample purchased by the FBI at the store where petitioner purchased his (3 RT 8-9). The Timex watch was the same catalog number and year of manufacture (3 RT 347), but the word "Timex" on the watch on the device was not on the sample (2 RT 198, 3 RT 5). The wirenuts on the device appeared to be the same as a sample purchased by the FBI (2 RT 346-347). The circuit tester found in Dadaian's suitcase appeared the same as the purchased sample (2

RT 346).

During this day of surveillance at approximately 1:15, petitioner left his residence carrying something toward the parking area and returned without it (2 RT 219).

Codefendant Dadaian testified that petitioner was at the White Oak Armenian Church at the time he packed the timing device, the blasting cap and the dynamite in the suitcase (2 RT 241-242). Dadaian found the device at the preschool in the back of the Church area where Hovsepian had told him it was left (2 RT 251). Dadaian denied anyone was with him at the time he packed the explosive device in the suitcase (2 RT 243, 251). Petitioner and codefendant Yacoubian were at the Church but outside (2 RT 247). Dadaian testified there never was a time when he met with his co-conspirators that petitioner was present to discuss their plans (2 RT 250). Petitioner did not give him the device nor tell him where it

might be (2 RT 250-251).

On 21 October 1982 before going to the White Oak Armenian Church, petitioner began circling the blocks to check for a tail, which the FBI agent characterized as "dry cleaning" (2 RT 228). When petitioner arrived home that evening around 9:25, he parked and walked to the sidewalk and checked up and down the street. About five minutes later he drove out of the complex and made a u-turn and returned home, and 45 minutes later he drove and circled the neighborhood looking for possible surveillance units (2 RT 230-231).

During their surveillance of petitioner on 21 October 1982 and after the first purchase of items (10:47 a.m.), the FBI saw petitioner arrive at his house and later leave for a shopping area in a car driven by an unknown person (1 RT 34, 2 RT 155-156, 204). At 2:20 p.m., petitioner in his car, picked up an unknown individual in a plaid shirt and they

drove with intermittent stops to the Armenian School on Beverly Road in Pico Rivera where he arrived about 3:10 p.m. (2 RT 156-157, 225). At 6:23 p.m., petitioner was seen to leave the Armenian School with an unidentified white male whom he dropped off on his way to the Armenian Church on White Oak (2 RT 226-228).

REASONS FOR ALLOWANCE OF THE WRIT

I. THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (JACKSON V. VIRGINIA, 443 U.S. 307 (1979)) AND CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS.

In affirming the first direct review of the petitioner's conviction, the Court of Appeals below stated:

> "Once existence of a conspiracy has been established, evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it (citations)" **United States v. Berberian**, 851 F.2d. 236, 238 (9th Cir. 1988) (Appendix A).

This standard of review conflicts with the requirement that every element, including defendant's nexus with the conspiracy, be established by proof beyond a reasonable doubt. This Court has held:

> "Lest there be any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." **In re Winship**, 397 U.S. 358, 364 (1970) (emphasis added).

This Court in review of the federal criminal conviction has a well-established tradition that there must at least be substantial evidence taking the view most favorable to the Government to support it. **Glasser v. United States**, 315 U.S. 60, 80 (1942), **Hamling v. United States**, 418 U.S. 87, 124 (1974).

In **Jackson v. Virginia**, 443 U.S. 307 (1979), in the federal habeas corpus review of

the sufficiency of evidence in a state criminal case, this Court indicated that standard of review was evidence to support the finding of guilt beyond a reasonable doubt:

> "After **Winship** the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record could reasonably support a finding of guilt beyond a reasonable doubt." 443 U.S. 307, 318.

The court stated that it could not be seriously argued that a "modicum" of evidence could by itself rationally support a conviction beyond a reasonable doubt. 443 U.S. 307, 320.[3] In **Bose Corp v. Consumer's Union of U.S., Inc.**, 466 U.S. 485, 506-507 (1984), this Court

[3] Recently this Court has expanded the admissibility of co-conspirator statements that are presented to the trier of fact by permitting their use without a showing of unavailability of the witness (**United States v. Inadi**, 475 U.S. 387 (1986), and without a showing of independent indicia of reliability of such statement (**Bourjaily v. United States**, 107 S.Ct. 2775 (1987)). Since the Court has relaxed the standard for admissibility of evidence, there would be a greater need to insure the enforcement of the review standard of proof of guilt beyond a reasonable doubt.

commented on the ultimate responsibilities of appellate courts to conduct an independent review of constitutional claims when necessary and stated:

> "We have therefore rejected the contention that a jury finding of obscenity vel non is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern."

Some evidence is not enough. After a note in a law review demonstrated frequency of the slight evidence rule's use in both the Fifth and the Ninth Circuit,[4] in **United States v. Malatesta**, 590 F.2d 1379 (5th Cir. 1979), the Fifth Circuit, in an unanimous **en banc** opinion, prohibited the use of this rule:

> "We are convinced that when the sufficiency of the evidence to support any criminal conviction, including conspiracies, is challenged on appeal the correct standard of review is substantial evidence, it being understood, of course, that the

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[4] Connection defendants to conspiracies: The Slight Evidence Rule and Federal Courts, 64 **Virginia Law Review**, 881 (1978).

> evidence is to be viewed in the light most favorable to the Government.
>
> The slight evidence rule as it is used and applied on appeal in conspiracy cases since 1969 should not have been allowed to worm its way into the jurisprudence of the Fifth Circuit. It is accordingly banished as to all appeals hereafter to be decided by this Court" (**Malatesta, supra**, 590 F.2d at 1382 (Emphasis theirs).

The Fifth Circuit's position on the banishment of the "slight evidence" rule has been unwavering. See **United States v. Glasgow**, 658 F.2d 1036, 1040 (5th Cir. 1981); **United States v. DeSimone**, 660 F.2d 532, 536 (5th Cir. 1981); **United States v. Freeman**, 660 F.2d 1030, 1038 (5th Cir. 1981); **United States v. Escobar**, 674 F.2d 469, 476-77 (5th Cir. 1982); **United States v. Shackelford**, 667 F.2d 422, 426 (5th Cir. 1982); **United States v. Kimble**, 719 F.2d 1253 (5th Cir. 1983). The Eleventh Circuit, which adopted the law of the Fifth Circuit, has continued to cite **Malatesta** for a requirement that there must be substantial evidence to

support the conspiracy conviction. **United States v. Spradlen**, 662 F.2d 724, 727 (11th Cir. 1981); **United States v. Slocum**, 708 F.2d 587, 594 (11th Cir. 1983); **United States v. Deparias**, 805 F.2d 1447 (11th Cir. 1986).

In **United States v. Marsh**, 747 F.2d 7 (1st Cir. 1984), the First Circuit found that there was a conspiracy and that all defendants were participants, but the court was concerned that there was sufficient evidence of a knowing participation by each of the defendants in the conspiracy charged, for such knowledge and intent was a necessary element of the case to be proven beyond a reasonable doubt. The Court of Appeals was troubled by the District Court's reliance on the principle that slight evidence as to the defendant's knowledge of the scheme may be sufficient. 747 F.2d 7, 12. The court recognized the **en banc** banishment of that rule in **Malatesta**, and relied upon a construction of the rule that would clarify that the word

"slight" modifies "connection" and not evidence. Cf **United States v. Dunn**, 564 F.2d 348, 357 (9th Cir. 1977). 747 F.2d 7, 13. The court went out of its way to advise counsel and judges not to take literally such language that,

> "Once the existence of a conspiracy is clearly established, slight evidence may be sufficient to connect the defendant with it." (Citations from various Circuits).

The court noted,

> "So understood, the slight evidence rule 'would vitiate the Government's ever-present burden of proof, the requirement that guilt must be proved . . . beyond a reasonable doubt. . .." 747 F.2d 7, 13, n 3.

The Ninth Circuit has consistently followed the slight evidence rule since its inception.[5] Application in petitioner's case

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[5] See **United States v. Murray**, 751 F.2d 1528, 1534 (9th Cir. 1985); **United States v. Spetz**, 721 F.2d 1457, 1478 (9th Cir. 1983); **United States v. Ramirez**, 710 F.2d 535, 548 (9th Cir. 1983); **United States v. Brooklier**, 685 F.2d 1208, 1219 (9th Cir. 1982); **U.S. v. Fleishman**, 684 F.2d 1329, 1340-41 (9th Cir. 1982); **United States v. Kenney**, 645 F.2d 1323, 1335 (9th Cir. 1981); **United States v. Jabara**, 618 F.2d 1319, 1328 (9th Cir. 1980); **United States v. Beecroft**, 608 F.2d 753, 757 (9th Cir. 1979); **United States v. Weaver**, 594 F.2d 1272, 1274 (9th Cir. 1979); **United States v.**

is not unique, but it points out a legal "end run" of requirement of proof beyond a reasonable doubt of the defendant's involvement in the conspiracy. In this case, the existence of the conspiracy by the four co-defendants was not disputed. The few innocuous telephone calls of the petitioner arranging for two meetings with Hovsepian, the purchase of the component parts that were assembled by others into a timing device, and the concerns about surveillance does not amount to evidence beyond a reasonable doubt of the petitioner's knowing participation in the conspiracy. The fundamental question is whether the petitioner was a co-conspirator. To apply the "slight evidence" test, is to completely undermine the requirement that direct appellate review should

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Cloughessy, 572 F.2d 190, 191 (9th Cir. 1977); **United States v. Martin**, 567 F.2d 849, 851 (9th Cir. 1977); **United States v. Eddy**, 549 F.2d 108, 111 (9th Cir. 1976); **United States v. Cruz**, 536 F.2d 1264, 1266 (9th Cir. 1976).

require proof beyond a reasonable doubt.[6]

This court needs to clarify the standard of appellate review in conspiracy cases and, at least, abolish the "slight evidence" rule for federal courts.

II. THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL.

The petitioner along with the four named co-defendants was charged that he "knowingly and intentionally transported in interstate commerce certain explosive material with the knowledge and intent that is was to be used to injure and intimidate individuals and that it was to be used to damage or destroy a building, or other real or personal property." (Emphasis added) (CR 2:6). The court gave an aiding and abetting instruction, and the court of appeals

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[6] In **Jackson v. Virginia**, the court required proof beyond a reasonable doubt in federal habeas corpus review of a state conviction. A fortiori, it should be required in direct federal criminal appeals.

affirmed on the aiding and abetting. The petitioner was never involved with the transportation, and the record fails to show any connection of the petitioner with the explosive material, dynamite or blasting caps, or with the assembled explosive device. The petitioner acquired some of the parts ultimately used in the timing device, but there was no evidence showing his involvement either in the assembly of the parts nor that the parts were acquired for such a purpose. That he acquired parts not used support his role as an unknowing participant.

The intentional transportation in interstate commerce is not only the essential element of the offense, but it is <u>also</u> the basis for federal jurisdiction. The evidence of record failed to show any nexus with the transportation or knowledge of the transportation. The evidence of record must support proof beyond a reasonable doubt as to

every essential element of the offense. **Jackson v. Virginia**, 443 U.S. 307 (1979).

The court of appeals held that "scienter as to the interstate transportation element of federal offenses is not ordinarily required." (Appendix A7). This fundamentally misconstrued the specific requirements of this statute that there be a knowing and intentional transportation. This Court needs to respond to the confusion created between the jurisdictional predicate and an expressed element of the offense. Proof of this offense required that the petitioner be aware of the transportation of the explosive. Even construing the evidence most favorably for the Government, the petitioner's purchases, made when accompanied by another, are neutral in themselves and fail to reveal knowledge of their ultimate use in the timing mechanism. The evidence of record failed to show any knowledge of petitioner of the explosive

materials or their transportation.

III. THE WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT.

On the day of trial, 11 February 1986, petitioner's trial counsel filed a motion with the court requesting dismissal for violation of the Speedy Trial Act (STA). The motion was denied and petitioner was ultimately convicted. On appeal, the Court of the Ninth Circuit did not reach the merits of the issue,[7] holding that the motion to dismiss was not properly made to the trial court.

Title 18, U.S.Code §3162(a)(2) states in part,

> Failure of the defendant to move for dismissal prior to trial. . . shall constitute a waiver of the right to

[7] The petitioner contended that 93 non-excludable days had elapsed: 27 days from indictment to the first order excluding time (no such orders had been challanged on appeal), 48 days from the issuance of the mandate on the Government's interlocutory appeal to the Government's filing of a motion for immunity of a witness (Dadaian), and 18 days from the grant of the order of immunity to the day before the jury trial. See Petitioner's Supplemental Brief on Sppedy Trial Act filed in the Court of Appeals.

dismissal under this section.

Here, the clerk's record clearly reflects that voir dire of the jury did not begin until after petitioner filed "Documents Submitted in support of Motion to Dismiss: Speedy Trial Act" (CR 344-345) (emphasis added), thus meeting his pre-trial filing deadline to avoid waiver. At that point, trial was set to begin twenty-three non-excludable days past the seventy-day Speedy Trial Act limit.

Petitioner met the requirement of 18 U.S.Code §3162(a)(2). His motion to dismiss was made prior to the trial commencing. This Court needs to clarify what triggers the responsibility for keeping track of the STA computation: is it the duty of the prosecutor or the courts, or both. The STA affects the entire federal judiciary and may be perceived as an unwanted burden, but this Court should insure that an objection within the scope of the standard set by Congress is honored by

federal courts.

CONCLUSION

Because of the fundamental constitutional questions raised and the standard to assert an objection under the Speedy Trial Act, this Court is requested to issue a writ of certiorari to review petitioner's conviction.

Respectfully submitted,

13 December 1988

John J. Cleary
Attorney for Petitioner,
DIKRAN BERBERIAN

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DIKRAN BERBERIAN, *Defendant-Appellant.*	No. 86-5073 D.C. No. CR 82-917-R-3 OPINION

Appeal from the United States District Court
for the Central District of California
Manuel L. Real, District Judge, Presiding

Argued December 7, 1987—Pasadena, California
Submitted March 10, 1988*

Filed June 28, 1988

Before: Diarmuid F. O'Scannlain and Edward Leavy,
Circuit Judges, and Samuel P. King**, District Judge.

Opinion by Judge Leavy

*Submission in this case was deferred pending the filing of *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988).

**The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

SUMMARY

Criminal Procedure

Appeal from conviction to bomb and aiding and abetting the transportation of explosive materials. The court affirmed holding that the evidence was sufficient to uphold the convictions.

From intercepted conversations, the FBI learned that appellant Dikran Berberian and others were planning to take violent action against an Honorary Turkish Consulate. Berberian's bomb components were discovered. Berberian's trial was severed from his co-defendants'. He and the government stipulated to excludable time under the Speedy Trial Act. He later filed a motion to withdraw from the stipulation and requested that the court dismiss the case for violation of the Speedy Trial Act. Judge Pfaelzer denied the motion, recused herself, and transferred the case. The trial court denied Berberian's motion to dismiss under the Speedy Trial Act and a jury found him guilty.

[1] The record shows that Berberian was not merely a messenger or unknowing instrument of the conspirators. [2] The evidence was sufficient to establish aiding and abetting in the transportation of the explosive materials. [3] A defendant who seeks dismissal cannot wait until trial to assert a Speedy Trial Act violation. [4] Berberian argues that his oral request for dismissal, made on the first day of his trial, relates back to his Speedy Trial Act motion made before Judge Pfaelzer. However, he includes delay after the interlocutory appeal for the district court's quashing of the government's subpoena of a co-conspirator. Some of this delay occurred more than a year after Judge Pfaelzer denied Berberian's Speedy Trial Act motion. Under such circumstances, he was required to make a new and timely pretrial motion to dismiss under the Speedy Trial Act. [5] Although Berberian objected to Judge Pfaelzer's

reassignment, he did not ask for a random reassignment. Thus, he failed to preserve for appeal any issue with respect to his claim of right to random reassignment under the local rules.

COUNSEL

John J. Cleary, Cleary & Sevilla, San Diego, California, for the defendant-appellant.

Thomas H. Bienert, Jr., Assistant United States Attorney, Criminal Division, Los Angeles, California, for the plaintiff-appellee.

OPINION

LEAVY, Circuit Judge:

Berberian appeals his conviction by a jury of conspiracy to bomb, 18 U.S.C. §§ 371 and 844 (1982), and aiding and abetting transportation of explosive materials, 18 U.S.C. § 844(d) (1982). Berberian contends 1) the evidence was insufficient to support his conspiracy conviction; 2) the evidence was insufficient to support his conviction of aiding and abetting transportation of explosive material; 3) his case should have been dismissed for violation of the Speedy Trial Act, 18 U.S.C. § 3162 (1982); 4) reassignment of his case to Judge Real violated due process and local rules and entitles him to a new trial; 5) the government was required to obtain wiretap authorization under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), 18 U.S.C. §§ 2510-2521 (1986), not under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. §§ 1801-1811 (1982); 6) the district court should have disclosed the government's ex parte in camera submission of classified information. We affirm.

FACTS AND PROCEEDINGS BELOW

In September of 1982 the FBI, as part of an investigation of Armenian terrorist groups, obtained authorization from the United States Foreign Surveillance Court (USFSC) under the Foreign Intelligence Surveillance Act (FISA) to place a wiretap on Viken Hovsepian's telephone in Santa Monica, California. From conversations intercepted by the wiretap, the FBI learned that Berberian, along with Viken Hovsepian, Karnig Sarkissian, Viken Yacoubian, and Steven Dadaian, was a participant in a plan to take violent action against the Honorary Turkish Consulate in Philadelphia.

The FBI's wiretap intercepted four conversations between Berberian and Hovsepian to arrange meetings between the two men. In one conversation, Berberian indicated he did not wish to discuss matters over the telephone; in two of the conversations, the two men spoke in code.

In October of 1982 Berberian purchased a wooden H-block, a circuit tester, and a Timex watch which he delivered to his co-defendants at the Armenian Church. When driving to the church, Berberian circled the blocks as if checking for a tail. Returning home that evening, Berberian parked, then walked to the sidewalk and checked up and down the street.' A few minutes later, he drove away, made a U-turn, and returned home. Forty-five minutes later, he circled the neighborhood in his car as if looking for possible surveillance units.

On October 21, the USFSC authorized continuation of the wiretap because they believed a bomb or components thereof were being transported from Los Angeles to Boston on a Northwest Orient flight on which Dadaian was a passenger. FBI agents ran the luggage accompanying the flight through an x-ray scanner and detected part of a bomb in a suitcase. They opened the suitcase and found all the components necessary for a bomb, including a timing device composed of a

wooden H-block, a circuit tester, and a Timex watch later identified as those purchased by Berberian.

After indictment, Berberian and the other defendants unsuccessfully moved to suppress the evidence from the FISA wiretap and to compel disclosure of an ex parte in camera submission of classified information made by the government. Thereafter, Berberian's trial was severed from his co-defendants'. Berberian and the government stipulated to excludable time under the Speedy Trial Act. Subsequently, the government appealed the court's quashing of the government's subpoena of Dadaian as a witness. This court affirmed the quashing of the subpoena. *United States v. Berberian*, 767 F.2d 1324 (9th Cir. 1985).

Berberian's counsel filed a motion to withdraw from the stipulation concerning excludable time and requested that the court dismiss the case for violation of the Speedy Trial Act. Judge Pfaelzer denied the motion, recused herself, and transferred the case to Judge Real for trial.

On the first day of his trial, Berberian moved to dismiss under the Speedy Trial Act. The trial court denied the motion. The jury found Berberian guilty of conspiracy to bomb and of aiding and abetting transportation of an explosive device. He timely appealed.

DISCUSSION

A. Sufficiency of Evidence of Conspiracy to Bomb

This court will overturn the conspiracy conviction for insufficient evidence only if, after viewing all the evidence in the light most favorable to the government, it appears no rational jury could have found the essential elements of conspiracy beyond a reasonable doubt. *United States v. Disla*, 805 F.2d 1340, 1348 (9th Cir. 1986).

Once existence of a conspiracy has been established, evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it. *United States v. Taylor*, 802 F.2d 1108, 1116 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1809 (1987); *United States v. Hobson*, 519 F.2d 765, 775 (9th Cir.), *cert. denied*, 423 U.S. 931 (1975). Proof of a particular defendant's connection to the conspiracy can be established by circumstantial evidence. *Disla*, 805 F.2d at 1348.

[1] Berberian concedes the existence of a conspiracy, but he argues the evidence shows he was merely a messenger or unknowing instrument of the conspirators. However, the record shows Berberian had four telephone conversations with Hovsepian, was concerned about possible surveillance, and purchased items that were included in the bomb. From such evidence a reasonable jury could have inferred, beyond a reasonable doubt, that Berberian knowingly helped create a bomb which would be used to blow up the Turkish Consulate in Philadelphia.

Berberian also argues that since interstate transportation is an element of the target offense of 18 U.S.C. § 844(d), the government must present proof Berberian knew the bomb would be transported across state lines. That argument lacks merit. The knowing use of interstate facilities is not ordinarily an essential element of substantive offenses of interstate travel. *See, e.g., United States v. Stafford*, 831 F.2d 1479, 1485 & n.8 (9th Cir. 1987) (knowing use of interstate facilities is not part of the mens rea component of a Travel Act offense absent statutory language requiring such intent when there is no congressional purpose that would be furthered by such a requirement and absent unfairness in criminalizing the unknowing use of interstate facilities when the defendant is knowingly engaged in unlawful activity); *United States v. Muza*, 788 F.2d 1309, 1311-12 (8th Cir. 1986) (government did not have to prove a defendant accused of conspiracy to commit arson in violation of 18 U.S.C. § 844(i) had actual knowledge the

tavern was used in interstate commerce because interstate nexus in criminal statutes is most often solely for the purpose of conferring federal jurisdiction); *Hobson*, 519 F.2d at 769 (when defendant accused of conspiring to elude a federal officer in violation of federal law, scienter as to the federal nature of the offense is not required under 18 U.S.C. §§ 371 and 373).

B. Sufficiency of Evidence of Aiding and Abetting the Transportation of the Explosive Material

[2] In reviewing the sufficiency of the evidence that Berberian aided and abetted transportation of an explosive, we view all evidence in the light most favorable to the government to determine if the jury could have found the essential elements of the charge beyond a reasonable doubt. *See Disla*, 805 F.2d at 1348. An abettor's criminal intent may be inferred from attendant facts and circumstances and need not be established by direct evidence. *United States v. Reese*, 775 F.2d 1066, 1072 (9th Cir. 1985).

First, Berberian argues there is no evidence he aided in or knew of the interstate transportation of the bomb. That argument lacks merit. Scienter as to the interstate transportation element of federal offenses is not ordinarily required. *Stafford*, 831 F.2d at 1485 & n.8; *Muza*, 788 F.2d at 1312; *Hobson*, 519 F.2d at 769.

Second, Berberian argues there is no evidence that he aided and abetted in criminal acts concerning "explosive material," as specified in Count II. Berberian reasons his purchase of an H-block, Timex watch, and circuit tester connect him with an "explosive device" but not with "explosive material." That argument lacks merit. Any explosive can be broken down into non-explosive parts; therefore, it is logical to assume explosive material includes all components of a bomb, including a timing device.

C. Speedy Trial Act

[3] We review the district court's disposition of a Speedy Trial Act issue for clear error as to factual findings and de novo as to application of legal standards. *United States v. Henderson*, 746 F.2d 619, 622 (9th Cir. 1984), *aff'd*, 476 U.S. 321 (1986). The parties cannot stipulate to a waiver of the protections of the Speedy Trial Act. *United States v. Pringle*, 751 F.2d 419, 433-34 (1st Cir. 1984). However, a defendant who seeks dismissal cannot wait until trial to assert a Speedy Trial Act violation. The statute provides, "[f]ailure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2).

[4] On appeal, Berberian contends he did not waive his right to dismissal under the Speedy Trial Act. He argues that his oral request for dismissal, made on the first day of his trial, February 11, 1986, relates back to his Speedy Trial Act motion of November 1984 made before Judge Pfaelzer. However, in Berberian's calculations in support of his February 11, 1986 motion, he includes delay after the interlocutory appeal of the district court's quashing of the government's subpoena of a co-conspirator. Some of this delay occurred more than a year after Judge Pfaelzer denied Berberian's 1984 Speedy Trial Act motion. Under such circumstances, Berberian was required to make a new and timely pretrial motion to dismiss under the Speedy Trial Act. Certainly, it is fallacious for Berberian to argue that the nonmeritorious 1984 motion is being "renewed" by his oral motion on the day of his trial. Accordingly, we conclude Berberian waived any right to have his case dismissed under the Speedy Trial Act. We need not reach the merits of his motion.

D. Reassignment to Chief Judge Real

Berberian contends his case should be retried because Judge Pfaelzer's reassignment of the case to Chief Judge Real

violated his right to due process and did not conform to General Order 224 of the Central District of California. Berberian's position lacks merit.

Retrial for violation of local rules on assignment of judges is not warranted unless the defendant can show prejudice. *E.g., United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982) (transfer of a case will not be invalidated on appeal unless the defendant succeeds in showing a pervasive climate of partiality or unfairness due to the transfer); *United States v. Radlick*, 581 F.2d 225, 230 (9th Cir. 1978) (a transfer not in conformity with a local rule is not grounds for reversal when neither appellant was able to demonstrate how he was prejudiced); *United States v. Torbert*, 496 F.2d 154 (9th Cir.), *cert. denied*, 419 U.S. 857 (1974) (unless prejudice by the second judge is manifested at trial, the accused is assumed to have received the fair trial to which due process entitles him).

The reassignment issue arose as a collateral matter to the Speedy Trial issue. Judge Pfaelzer ordered the time from November 10, 1983, to November 6, 1984, excluded under the Speedy Trial Act, finding that, pursuant to 18 U.S.C. § 3161(h)(8)(A), the ends of justice were served by allowing Berberian to sever and have his case tried later from that of his co-defendants. Judge Pfaelzer also ordered excluded the time from August 28, 1984, to September 25, 1984, finding that, pursuant to 18 U.S.C. § 3161(h)(8)(A)(iv), the interests of justice were served by allowing Berberian a continuance necessary to provide him with continuity of counsel. Finally, Judge Pfaelzer ordered the time period between September 25, 1984, and November 6, 1984, excluded pursuant to 18 U.S.C. § 3161(h)(3)(A) and (B) because the government's explosive experts were in Beruit, Lebanon, investigating the bombing of the United States Embassy and were unavailable for trial. Judge Pfaelzer's findings under 18 U.S.C. § 3161 were made pursuant to Berberian's representations in the parties' stipulation as to excludable time that justice would be served if Berberian could sever his case and delay his trial in

order to ensure continuity of counsel, allow Berberian's counsel to narrow the issues for Berberian's trial and concentrate exclusively on the evidence relevant to Berberian's defense, and avoid any prejudice to Berberian that may have resulted from the ongoing trial of the other four co-defendants.

When Berberian's trial counsel requested that Judge Pfaelzer vacate his stipulation and dismiss for violation of the right to a speedy trial, Judge Pfaelzer told trial counsel, "I do feel that you lack integrity." She recused herself stating, "For the reason I have just stated to you, I do not feel that I should sit as a judge in this case and I am going to give it to the Chief Judge." She stated Berberian could go to trial tomorrow with Judge Real. The record does not show the condition of the trial calendar of either judge. We assume Judge Real was ready to try the case even though for other reasons the trial was delayed.

On appeal, Berberian claims the reassignment was punitive and violated due process. However, a litigant takes the risk a judge will rule in a manner consistent with the litigant's request. To the extent Judge Pfaelzer's reassignment was made to protect Berberian's asserted rights under the Speedy Trial Act, he has no basis to complain. Berberian has not shown prejudice nor even argued his trial was in any way unfair. Thus, the reassignment did not violate his right to due process.

[5] When Judge Pfaelzer recused herself and stated she was reassigning to Chief Judge Real, Berberian objected to the reassignment to Judge Real. He did not ask that the case be randomly reassigned by the clerk's office as contemplated by General Order 224. Thus, Berberian did not preserve for appeal any issue with respect to his claim of right to random reassignment under the local rules.

E. FISA Wiretaps and Ex Parte In Camera Material

Berberian contends the FBI's FISA wiretap was illegal and the district court should have disclosed material the govern-

ment submitted to it ex parte and in camera. Berberian adopts the arguments as made in his co-defendants' briefs on these two issues. The Ninth Circuit recently affirmed the district court's decisions on the validity of the FISA wiretap and the propriety of the ex parte in camera submissions. *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988). That opinion is controlling on the FISA and ex parte in camera issues.

The district court is AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	No. 86-5073
	D.C. No.CR 82-917-R-3
Plaintiff-Appellee,	
v.	O R D E R
DIKRAN BERBERIAN,	FILED: Nov 2 - 1988
	Cathy A. Catterson,Clerk
Defendant-Appellant.	U.S. Court of Appeals

Before: O'SCANNLAIN, LEAVY, Circuit Judges, and KING[1], District Judge.

The panel has voted to deny the petition for rehearing. Judges O'Scannlain and Leavy have voted to reject the suggestion for rehearing en banc, and Judge King has so recommended.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX B

[1] The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

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FILED
MAR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1038

In the Supreme Court of the United States

OCTOBER TERM, 1988

DIKRAN BERBERIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the proper standard in affirming petitioner's conviction for conspiracy.

2. Whether there was sufficient evidence to show that petitioner aided and abetted the interstate transportation of an explosive.

3. Whether petitioner waived his right to argue a violation of the Speedy Trial Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

United States v. *Ambrose*, 707 F.2d 1209, (11th Cir. 1983)	8
United States v. *Bailey*, 607 F.2d 237 (9th Cir. 1979)	6
United States v. *Carlson*, 561 F.2d 105 (1st Cir.), cert. denied, 434 U.S. 973 (1977)	7
United States v. *Daly*, 716 F.2d 1499, (9th Cir. 1983), cert. dismissed, 465 U.S. 1075 (1984)	8
United States v. *Duncan*, 855 F.2d 1528 (11th Cir. 1988), petition for cert. pending (No. 88-6217)	7-8
United States v. *Feola*, 420 U.S. 671 (1975)	7
United States v. *Fraley*, 858 F.2d 230 (5th Cir. 1988), cert. denied, No. 88-6094 (Jan. 17, 1989)	7
United States v. *Huber*, 772 F.2d 585 (9th Cir. 1985)	6
United States v. *Loud Hawk*, 474 U.S. 302 (1986)	8
United States v. *Loya*, 807 F.2d 1436 (9th Cir. 1987)	6
United States v. *Marsh*, 747 F.2d 7 (1st Cir. 1984)	6
United States v. *Meyers*, 847 F.2d 1408 (9th Cir. 1988)	6
United States v. *Michaels*, 796 F.2d 1112 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987)	7
United States v. *Samples*, 713 F.2d 298, (7th Cir. 1983)	8
United States v. *Tercero*, 640 F.2d 190, (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981)	8

Constitution and statutes:

U.S. Const. Amend. VI	8
Speedy Trial Act, 18 U.S.C. 3162(a)(2)	3, 8
18 U.S.C. 371	1
18 U.S.C. 844(d)	2, 7

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 851 F.2d 236.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1988. A petition for rehearing was denied on November 2, 1988. The petition for a writ of certiorari was filed on December 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy, in violation of 18 U.S.C. 371 (Count

1), and of aiding and abetting the interstate transportation of explosive material, in violation of 18 U.S.C. 844(d) (Count 2). He was sentenced to consecutive terms of five years' imprisonment on Count 1 and ten years' imprisonment on Count 2. The court, however, suspended all but six months of the ten-year term in favor of five years' probation.

1. The evidence at trial, which is summarized in the opinion of the court of appeals (Pet. App. A1-A11), showed that petitioner participated in a scheme to bomb the Honorary Turkish Consulate in Philadelphia. In September of 1982, the FBI, as part of an ongoing investigation of Armenian terrorist groups, obtained authorization from the United States Foreign Intelligence Surveillance Court (USFISC) to place a wiretap on co-defendant Viken Hovsepian's telephone in California. Although petitioner and four other participants spoke in Armenian and used code words, FBI translators and investigators were able to crack the code and learn of the plot against the Turkish Consulate. Pet. App. A4.

The FBI intercepted four conversations between petitioner and Hovsepian in which they arranged meetings. In two conversations the men spoke in code; in one conversation petitioner stated that he did not want to discuss their plans over the telephone. In October 1982, petitioner bought a wooden H-block, a circuit tester, and a Timex watch, which he delivered to his co-defendants at an Armenian church. On his way to the church, petitioner circled the area as if checking for surveillance. After driving away from the meeting, petitioner parked, walked to the sidewalk, and looked up and down the street. A few minutes later, he drove away, made a U-turn, and went back home. Later that evening he drove his car in circles around the neighborhood as if looking for surveillance. Pet. App. A4.

Based on its electronic surveillance, the FBI concluded that a bomb or its components were being moved the following day from Los Angeles to Boston on a particular flight. FBI agents put the plane's luggage through an x-ray scanner and detected parts of a bomb in a suitcase. They opened the suitcase and found all the components necessary for a bomb, including those items bought by petitioner—a wooden H-block, a circuit tester, and a Timex watch. Pet. App. A4-A5.

2. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A11). With respect to the conspiracy count, the court concluded (Pet. App. A6) that the evidence was sufficient to show that petitioner knowingly helped create a bomb that would be used to blow up the Turkish Consulate in Philadelphia. With respect to the aiding and abetting charge, the court rejected (Pet. App. A7) petitioner's contention that the government was required to prove that he had specific knowledge that the bomb was to be transported in interstate commerce. Finally, the court of appeals rejected (Pet. App. A8) petitioner's claim that his case should have been dismissed for a violation of the Speedy Trial Act. Without reaching the merits of petitioner's claim, the court held that petitioner had failed to make a timely motion to dismiss for an alleged violation of the Act and had therefore waived his right to dismissal. The court rejected petitioner's contention that his oral request for dismissal on the first day of trial related back to his earlier motion, which was made on different grounds and had been previously denied. The court stated that petitioner "was required to make a new and timely pretrial motion to dismiss under the Speedy Trial Act" when new grounds allegedly arose for such a motion (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 9-17) that the court of appeals improperly affirmed his conspiracy conviction on the basis of only "slight evidence" of his participation in the conspiracy. Petitioner, however, has ignored both the weight of the evidence supporting his conviction as well as the plain language of the court of appeals' opinion.

a. Petitioner conceded in the court of appeals that a conspiracy existed to bomb the Turkish Consulate in Philadelphia; his contention was that he was an unknowing instrument of the conspirators. See Pet. App. A6. The evidence, however, amply supported petitioner's knowing participation in the conspiracy. Petitioner had telephone conversations in September and October 1982 with co-defendant Hovsepian who, as petitioner acknowledged, planned with others to bomb the Consulate. In those recorded conversations, petitioner and Hovsepian arranged to meet at various places, some of which were identified in code. One of those meetings was scheduled to take place on October 19, 1982. Two days after that scheduled meeting, petitioner purchased two Duracel batteries, one "H" shaped wooden block, a toggle switch, wire nuts, a volt/ohmmeter and a Timex wristwatch—all of which were materials necessary to construct the explosive device. See Gov't C.A. Br. 5-6, 9.

Later that same day, petitioner was observed by surveillance units driving from his residence to an Armenian church in California. During his trip, petitioner drove in an evasive manner. At the church, petitioner met with co-defendant Steven Dadaian and was present when Dadaian placed the bomb components into a suitcase along with explosives. That suitcase was recovered by federal agents the next day at Logan International Airport in Boston, Massachusetts. When they opened the suitcase,

the agents found items identical to those purchased by petitioner. The suitcase was removed from an airplane on which Dadaian had traveled to Boston. Gov't C.A. Br. 5-6, 9.

On the basis of that evidence, the jury properly found that petitioner was a willing participant in the conspiracy to bomb the Consulate. The evidence showed that he had purchased the components for the timing mechanism of the bomb found in the suitcase at Logan International Airport. The timing mechanism had no plausible purpose other than to set off explosives such as the blasting cap and dynamite that were found in the same suitcase. Petitioner also bought the ohmmeter found in the suitcase; that device would ensure the proper wiring of the bomb prior to its detonation. Petitioner's purchases, viewed together with petitioner's presence at the Armenian church when the components of the explosives were placed in the suitcase and his use of counter-surveillance tactics on the way to and from the church, provided an ample basis for the jury to infer petitioner's knowing participation in the conspiracy.

b. Petitioner focuses on the court of appeals' statement that once the existence of a conspiracy is established, "evidence of only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation in it" (Pet. App. A6). That statement, he claims, indicates that the court of appeals—in conflict with other circuits—was applying a more lenient standard in reviewing the sufficiency of the evidence of conspiracy from that applicable to the sufficiency of the evidence of other crimes. That is not the effect of the quoted language.

The Ninth Circuit's reference to the "slight connection" needed to connect a defendant with a conspiracy does not mean that a defendant may be convicted of conspiracy on only "slight evidence." Rather, it means that a defendant

can be convicted of conspiracy if the jury reasonably finds, beyond a reasonable doubt, that the defendant was a party to the conspiracy, even if the defendant played a minor role or was a tangential figure in the conspiratorial scheme. The Ninth Circuit has made that point explicit in several cases, where it has explained that the term "slight" modifies "connection" and not "evidence," so that while a slight connection with a conspiracy suffices to convict one for conspiracy, "the government must prove beyond a reasonable doubt that the defendant knew of his connection to the charged conspiracy." *United States* v. *Meyers,* 847 F.2d 1408, 1413 (9th Cir. 1988). Thus, the evidence must establish "beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection is slight" (*ibid.*). See also *United States* v. *Loya,* 807 F.2d 1483, 1488 (9th Cir. 1987) ("Although the connection of the accused to the conspiracy may be slight, such evidence must be sufficient to satisfy a rational juror beyond a reasonable doubt."); *United States* v. *Huber,* 772 F.2d 585, 589 (9th Cir. 1985) ("slight connection between [the defendant] and the conspiracy is sufficient once the necessary intent is established"); *United States* v. *Bailey,* 607 F.2d 237, 243 (9th Cir. 1979) ("Once the existence of a conspiracy is established, evidence establishing beyond a reasonable doubt a connection of a defendant with the conspiracy, even though the *connection is slight,* is sufficient to convict him of knowing participation in the conspiracy") (emphasis in original; citation omitted). In short, the Ninth Circuit applies precisely the same standard that petitioner himself commends (Pet. 14-15) the First Circuit for applying in *United States* v. *Marsh,* 747 F.2d 7, 13 (1st Cir. 1984).

2. Petitioner renews his contention (Pet. 17-20) that the evidence was insufficient to support his conviction for aiding and abetting the interstate transportation of ex-

plosive materials. Specifically, he claims that there was no proof that he was involved in the interstate transportation of the bomb. The court of appeals correctly rejected that argument (Pet. App. A7). The government presented overwhelming evidence that petitioner knowingly aided and abetted the assembly of the bomb, anticipating its transportation from California to Boston. The explosive transported by petitioner's co-defendant Dadaian was composed of parts supplied by petitioner. The jury properly concluded that petitioner provided these parts in California as part of a conspiracy to blow up the Turkish Consulate in Philadelphia. Interstate transportation of the bomb was thus clearly contemplated by the co-conspirators, and petitioner's procurement of the parts for the bomb plainly aided and abetted its interstate transportation. Cf. *United States* v. *Fraley,* 858 F.2d 230, 232-233 (5th Cir. 1988), cert. denied, No. 88-6094 (Jan. 17, 1989).

In any event, the statute at issue here, 18 U.S.C. 844(d), provides that a person who "transports [any explosive] in interstate commerce" must do so "with the knowledge or intent that [the device] will be used to kill, injure, or intimidate." The language does not suggest any requirement of a specific intent to transport the device in interstate commerce, but only the fact of interstate transportation. Thus, the courts of appeals that have considered this question have concluded that scienter as to the interstate transportation element is not required. *United States* v. *Michaels,* 796 F.2d 1112, 1117 (9th Cir. 1986), cert. denied, 479 U.S. 1038 (1987); *United States* v. *Carlson,* 561 F.2d 105 (1st Cir.), cert. denied, 434 U.S. 973 (1977). Cf. *United States* v. *Feola,* 420 U.S. 671 (1975) (defendant need not be aware of officer's federal status in order to be subject to prosecution for assaulting a federal officer); *United States* v. *Duncan,* 855 F.2d 1528, 1536-1538 (11th Cir. 1988), petition for cert. pending, No. 88-6217 (filed

Dec. 30, 1988) (knowledge of crossing state lines not required in kidnapping offense; requirement that offender cross state lines merely furnishes basis for exercise of federal jurisdiction). There is no conflict among the circuits on this issue and thus no reason for further review.

3. Finally, petitioner claims (Pet. 20-22) that his case should have been dismissed because the government violated the Speedy Trial Act by failing to begin trial within 70 days of his indictment (18 U.S.C. 3162(a)(2)). Petitioner however, failed to raise that Speedy Trial Act claim prior to trial. On the first day of trial, he argued that the indictment should be dismissed on constitutional grounds; his argument relied on a Sixth Amendment decision of this Court, *United States* v. *Loud Hawk*, 474 U.S. 302 (1986), and did not refer to the Speedy Trial Act at all. Tr. 15-17. He now relies on a collection of documents he submitted at that time. Those documents, however, merely reflected the arguments he had previously made in the court of appeals on a prior appeal in this case. See Tr. 17-18; IV Tr. 6-7. Although petitioner referred to the Speedy Trial Act in the caption of that collection of documents, the district court found that the documents did not indicate that the Speedy Trial Act had been invoked in the prior proceeding before the court of appeals (IV Tr. 7); the oblique reference to the Speedy Trial Act in the caption of that collection of previously filed documents was certainly not sufficient to put the court on notice that petitioner intended to rely on the Act as the basis for the motion to dismiss that he filed on the day of trial. See *United States* v. *Tercero*, 640 F.2d 190, 195 & n.6 (9th Cir. 1980), cert. denied, 449 U.S. 1084 (1981); see also *United States* v. *Daly*, 716 F.2d 1499, 1506 n.5 (9th Cir. 1983), cert. dismissed, 465 U.S. 1075 (1984); *United States* v. *Samples*, 713 F.2d 298, 302 (7th Cir. 1983); *United States* v. *Ambrose*, 707 F.2d 1209, 1213-1214 (11th Cir. 1983).

The court of appeals was therefore correct in holding (Pet. App. A8) that petitioner waived his Speedy Trial Act claim by failing to raise it prior to trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699 00111

(3)

Supreme Court, U.S.
FILED
MAR 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1038

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

DIKRAN BERBERIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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14 pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENTS	4
I. THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (JACKSON V. VIRGINIA, 443 U.S. 307 (1979)) AND CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS.	4
II. THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL	7
III. THE WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT	9
CONCLUSION.	11

TABLE OF AUTHORITIES

Cite	Page
Jackson v. Virginia, 443 U.S. 307 (1979)	4
Krulewitch v. United States, 336 U.S. 440 (1949)	6
United States v. Dikran Berberian, No. 86-5073	1
United States v. Feola, 420 U.S. 671 (1975)	8
United States v. Malatesta, 590 F.2d 1379 (5th Cir. 1979)	6
United States v. Michaels, 796 F.2d 1112 (9th Cir. 1986)	7

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 88-1038

DIKRAN BERBERIAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

Petitioner, Dikran Berberian, replies to the facts and arguments in the Government's Brief in Opposition (BIO).

STATEMENT OF THE CASE

The Government contends that at the Armenian church "petitioner met with co-defendant Steven Dadaian and was present when Dadaian placed the bomb components into a suitcase along with explosives."[1] The evidence

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[1] BIO 4. At other places in the Brief in Opposition (BIO), this critical misstatement appears. See BIO 5 (presence at church when components of explosives were placed in the suitcase), BIO 2 (delivered components of device to other defendants at the church).

of record placed the petitioner outside the church with the co-defendant Yacoubian (2 RT 247). Dadaian who transported the explosive device and materials to Boston testified as a Government witness with immunity and denied anyone was with him when he packed the explosive device in the suitcase. (2 RT 243, 251). Dadaian also testified that petitioner was not present when his co-conspirators met to discuss their plans (2 RT 250) and that petitioner did not give him the device or tell him where it was located (2 RT 250-251).

The Government stated that Hovsepian, a conspirator, and the petitioner "in two conversations spoke in code." (BIO 2). Of the 27 FISA wiretaps, only four are short telephone conversations[2] concerning places to meet between Hovsepian and the petitioner. See Pet.

[2] There was only three conversations, because Hovsepian left a message on petitioner's answering machine about the meeting place being "number two." (Pet. 5; 2 RT 141).

5. The first call (30 Sep 82), the longest, concerned directions to a restaurant. (2 RT 123-127). In the second call (6 Oct 82) petitioner agrees to go to Hovsepian's house. (2 RT 134-135). In the third call and final conversation they agree to meet at place "number one," and Hovsepian says he has "good news." (2 RT 138-140). The characterization of the conversations as in code is misleading. That the meeting places were numbered does not justify labelling the conversations as coded. There were no coded references to explosives or to Hratch's son in the conversations of the petitioner, although they were found in the conversations between the co-defendants. These brief telephone conversations were the only direct state of mind evidence so critical in determining the existence of petitioner's nexus to the conspiracy. All language is a code of ideas, and these conversations translated from Armenian are not proof of involvement in the

conspiracy.

ARGUMENT

I. THE NINTH CIRCUIT'S CONTINUED USE OF THE SLIGHT EVIDENCE RULE IN REVIEWING CRIMINAL CONSPIRACIES CONFLICTS WITH THE CONSTITUTIONAL REQUIREMENT THAT THE RECORD REASONABLY SUPPORT A FINDING OF GUILT BEYOND A REASONABLE DOUBT (JACKSON V. VIRGINIA, 443 U.S. 307 (1979)) AND CONFLICTS WITH THE FIFTH AND ELEVENTH CIRCUITS.

The Government asserts that the Court of Appeals did not mean what it said:

> "evidence of only a **slight connection** is necessary in order to convict any one defendant of knowing participation in it." 851 F.2d 236, 238 (Emphasis added).

The Government interpolates the requirement of proof beyond a reasonable doubt (BIO 5-6) as an inherent modifier of "slight connection." This reduces the words to a tautological mantra: the clear and obvious meaning by arcane and esoteric interpretation is transformed into its antonym. The law should not resort to verbal deceptions. The defendant's knowing nexus to a conspiracy must be established by

proof beyond a reasonable doubt not by "evidence of a slight connection."[3] This appellate review formulation places too much emphasis on the existence of the conspiracy without the critical analysis, as in petitioner's case, of the proof of the defendant's knowing involvement in the conspiracy.

The "slight evidence" test is all the more dangerous because of the nature of the offense, for conspiracy is a vague and amorphous crime that depends more upon mental state than

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[3] The "slight evidence" test confuses the requirement of proof with extent of participation. The extent of participation is not relevant to the quantum determination of proof. Rather than distort the requirement of proof beyond a reasonable doubt, reviewing courts could adopt a standard federal jury instruction to address participation rather than proof:

"The extent of a defendant's participation has no bearing on the issue of the defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw the defendant within the ambit of the conspiracy." Sand, Siffert, Loughlin, and Reiss, **Modern Federal Jury Instructions** 19-26 (rev. 1988).

act. Justice Jackson, America's prosecutor at the Nuremburg Trials, confirmed:

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a special coloration from each of the many independent offenses on which it may be overlaid. It is always "predominantly mental in composition" because it consists primarily of a meeting of minds and an intent."

Krulewitch v. United States, 336 U.S. 440, 446-448 (1949). Given the broad definition of the offense and the recently relaxed rules on admissibility of co-conspirators' statements, this Court should insist on the enforcement of proof beyond a reasonable doubt. This Court must do for all federal courts what the Fifth Circuit en banc did in **United States v. Malatesta**, 590 F.2d 1379 (5th Cir. 1979): banish the slight evidence rule.[4]

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[4] The Government neither cites nor responds to this case. The Government erroneously contends that the petitioner would be satisfied by the semantical gymnastics of **United States v. Marsh**, 747 F.2d 7, 13 (1st Cir. 1984) (BIO 6). The **Marsh** decision was cited as an example of the judicial quagmire that needs to be

II. THE EVIDENCE OF RECORD DID NOT SUPPORT PROOF BEYOND A REASONABLE DOUBT OF THE PETITIONER'S INVOLVEMENT IN THE INTERSTATE TRANSPORTATION OF THE EXPLOSIVE MATERIAL.

The elements of 18 U.S.C. 844(d) are: (1) transportation in interstate commerce of (2) any explosive, (3) with the knowledge or intent that it will be used to injure or intimidate any individual. **United States v. Michaels**, 796 F.2d 1112, 1117 (9th Cir. 1986). The evidence failed as to the first and second elements.

The Government makes reference to the interstate transportation contemplated by the conspirators (BIO 7), but reliance on the actions of the conspirators is unfounded.[5] The

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resolved. Although petitioner cites **Malatesta** for the banishment of the rule, petitioner does not agree with its pre-**Jackson v. Virginia** requirement of "substantial evidence," but rather the requirement that the nexus of knowing involvement in a conspiracy be proved beyond a reasonable doubt.

[5] No **Pinkerton** [**v. United States**, 328 U.S. 640 (1945) (conspirator liable for substantive offenses committed by co-conspirators in furtherance of conspiracy)] instruction was requested by the Government or given by the trial court. (4 RT 35-51). The court of appeals below measured petitioner's conduct solely against the standard of aiding and abetting the transportation offense (Pet. App. A-7). If the Government failed to obtain a **Pinkerton** instruction, then the Court of Appeals could not consider that theory. **United States v. Disla**, 805 F.2d 1340, 1350

Court of Appeals held that petitioner was an aider and abettor with the requisite intent, but expressly held that "scienter as to interstate transportation element of federal offenses is not ordinarily required." (Pet. App. A-7). The court below held that the petitioner need not have aided in or knew of the interstate transportation. The essence of the offense was the interstate transportation as charged, which under the Government's analysis becomes irrelevant.

For some federal statutes the interstate commerce is a jurisdictional nexus that permits the Federal Government to pass police laws, a domain primarily within the authority of the States. In other cases, such as this, the interstate transportation of the explosive device is the prohibited criminal conduct. In **United States v. Feola**, 420 U.S. 671 (1975),

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(9th Cir. 1986).

the gravamen of the offense was the assault, and the defendant need not be aware of the federal status of officer assaulted. Here, the gravamen was the interstate transportation of the explosives. This Court must not permit the limitless expansion of the Congressional intent nor defeat the very wording of the statute itself.

III. THE WRITTEN MOTION TO DISMISS UNDER THE SPEEDY TRIAL ACT BEFORE THE COMMENCEMENT OF THE JURY VOIR DIRE WAS SUFFICIENT.

The Government properly acknowledges that a motion to dismiss, an actual document, making reference to the Speedy Trial Act was filed on the day of trial (BIO 8), and it was filed before the jury was impanelled.

Congress in the enforcement of the 70-days-to-trial requirement mandated ("shall be dismissed on motion of the defendant") relief when requested by the defense. The defense had the burden of proof (more than 70 days had elapsed), but the Government had the burden of

establishing any exclusions of time. If the defendant did not make the motion, the right to a dismissal was waived. 18 U.S.C. 3161(a)(2). The defense motion was made, but the district court never discovered the number of excludable days. The Government never satisfied its statutory obligation to demonstrate the excludable time, which it never did. The Court of Appeals recognized the possible violation, but held that the issue was not preserved for review because defense counsel did not adequately articulate the reasons for the dismissal.

The Speedy Trial Act was created by Congress to regulate the federal courts and insure prompt disposition of criminal cases. The sanctions and procedure for invoking sanctions are clearly spelled out. The defense filed the requisite motion, but neither the prosecutor nor the trial court was concerned about the actual computation. The district

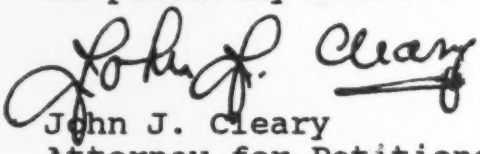
ruled on the motion without ever having the prosecution specifically calculate the excludable time.

It is the duty of the court and prosecutor to maintain responsibility for the enforcement of the Act, which, at a minimum, would be maintaining an accurate posture of the time remaining for trial. This Court must not permit the Act to be avoided by the creation of hurdles for the defense so as to excuse the prosecution and the court of their responsibilities under the Speedy Trial Act.

CONCLUSION

A writ of certiorari should be issued to review these important issues.

Respectfully submitted,



21 March 1989

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